NUMBER: 85-525

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

IN RE: Joe E. Fryar,

PETITIONER

BEST AVAILABLE COPY

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Does a district court have the power to repeal and nullify the writing requirements of Rule 7(b) (1), (2) and (3) of the Federal Rules of Civil Procedure and to abolish the making of a record as to applications and rulings regarding discovery depositions, by requiring that all motions for orders from the Court as to ongoing discovery depositions be made orally, outside a court, and by telephone?

TEXT OF RULE 7(b) (1), (2) and (3)

(b) Motions and other papers

(1) An application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity, the grounds therefor and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

PARTIES TO THE PROCEEDINGS

I, J. Minos Simon, counsel for Joe E. Fryar, hereby certify that the following are parties to this proceeding:

Joe E. Fryar, Petitioner
Alexandria, Louisiana

Magistrate Mildred E. Methvin, Respondent
United States District Court
Western District of Louisiana
Lafayette, Louisiana

Hon. John M. Shaw, Judge, Respondent
United States District Court
Western District of Louisiana
Opelousas, Louisiana

United States Court of Appeal
Fifth Circuit, Respondent

Edward C. Abell, Jr., Respondent
Lafayette, Louisiana

Potomac Insurance Company of Illinois
Chicago, Illinois

Rodney Kendrick
Alexandria, Louisiana

Hancock, Joseph & Daniels
Little Rock, Arkansas

Joseph D. Hancock
Little Rock, Arkansas

Swink & Co., Inc.
Little Rock, Arkansas

Wright, Lindsey & Jennings
Little Rock, Arkansas

Willian E. Skye
Alexandria, Louisiana

John W. Peck
Cincinnati, Ohio

Peck, Shaffer & Williams
Cincinnati, Ohio

National Union Fire Insurance Company
Pittsburgh, Pennsylvania

J. Minos Simon PER C.O.E.

J. MINOS SIMON

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IN THE
SUPREME COURT OF THE UNITED STATES

NUMBER: _____

IN RE: JOE E. FRYAR,

PETITIONER

PETITION ON BEHALF OF JOE E. FRYAR FOR A WRIT OF MANDAMUS

TO THE HONORABLES, THE CHIEF JUSTICES AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

OPINIONS BELOW

A Court-designated federal magistrate has ruled that, at the election of plaintiffs' counsel, all applications for court orders regarding discovery depositions shall be made orally, outside of Court, and by telephone. No record of such applications or objections or rulings is made and no provisions has been made for such a record. The magistrate has refused to honor any appeals entered orally as to such oral applications and oral orders. In response to petitioner's written application for a protective order barring such oral proceedings by telephone, the district court, Honorable John M. Shaw, judge presiding, has not only affirmed the magistrate's ruling, but that Court has directed that all applications to the district court itself shall be made orally, outside of Court, and by telephone. No provision is made for a record of any such oral applications, oral objections or oral rulings. As a result, the magistrate and the district court have judicially repealed the writing requirements of

Rule 7 of the Federal Rules of Civil Procedure, and the record making requirements of judicial proceedings.

On application for a writ of mandamus made to the United States Court of Appeals, Fifth Circuit, that Court, with the assignment of no reason, denied petitioner's application.

Petitioner respectfully petitions this Court to grant a writ of mandamus directed to the Court of Appeal, Fifth Circuit, ordering it to grant petitioner's writ application; alternatively directing the United States District Court, Western District of Louisiana, to vacate its interlocutory order of June 18, 1985 whereby it affirmed the ruling of the magistrate and additionally ordered the making of oral applications to the Court for orders regarding discovery procedures.

STATEMENT OF JURISDICTIONAL GROUNDS

On April 1, 1985, Federal Magistrate Methvin, over the vigorous objection of petitioner's counsel, entertained an oral application for a court order, while outside of court, and by telephone regarding a disputed matter occurring during the taking of an oral deposition. The magistrate furthermore issued an oral order, outside of court and by telephone, over the strenuous objection of petitioner's counsel. The magistrate moreover refused to accept and act upon petitioner's oral application for an appeal from the oral order, made immediately following the issuance of the oral order.

On a written application by petitioner to the district court for a protective order barring such judicial conduct by the magistrate, on June 18, 1985, the United States District Court, Western District of Louisiana, Honorable John M. Shaw, judge presiding, issued and entered an order

not only affirming the magistrate's ruling, but additionally directing that all applications to the district court itself for orders regarding discovery disputes as to discovery depositions be made orally, by telephone and outside of court. (See Appendix C)

On July 18, 1985, the United States Court of Appeal, Fifth Circuit, denied petitioner's application for a writ of mandamus filed by petitioner in his effort to vacate the June 18, 1985 order of District Judge Shaw. (See Appendix D)

This application for a writ of mandamus invokes the jurisdiction of the Court pursuant to 28 U.S.C. 1651; 28 U.S.C. 1254; 28 U.S.C. 2801 and the rules of this Court, as the only available means of vacating the June 18, 1985 order of the United States District Judge Shaw.

STATUTE INVOLVED

The pertinent statute involved is Rule 7 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The present action began on July 25, 1984 as a class action filed on behalf of bondholders by class representatives, Edward C. Abell, Jr., an attorney, (Abell) and Carey Walton, (Walton). Plaintiffs claim that their consent to the purchase of indentured bonds was procured by fraud. The total issue of the revenue bonds was in the initial sum of $13,500,050.00. These bonds were issued to finance the construction and operation of an intermediate care facility for the emotionally distrubed and mentally retarded. The complaint consists of eighty-eight (88) numbered paragraphs and includes six (6) separate counts of alleged wrongful conduct.

The complaint charges that the wrongful conduct alleged violates the Securities Act of 1933, Section 12(1) (2); the Securities Exchange Act of 1934, Section 12(b); the Racketeer Influence and Corrupt Organization Act; the Louisiana Bleu Sky Law (LSA-R.S. 51: 715(3)); and the Louisiana Civil Code. The total money judgment claimed exceeds $30,000,000.00.

The district court nominated Magistrate Methvin to schedule depositions and to hear all applications and render all orders in connection with such discovery. An extensive schedule of discovery by deposition upon oral examination was established and plaintiffs scheduled innumerable depositions and requested the massive production of documents. Such discovery procedures are destined to continue for the next ten months.

Early on plaintiffs initiated oral applications to the Court for orders regarding discovery disputes. These applications were made by telephone. The latest oral application made by plaintiffs' attorneys during the taking of a deposition by oral examination sought an order from the court to exclude a witness-person attending the taking of the deposition. When objection was made by petitioner as to such oral application, the magistrate ignored and rejected the objection and directed that these applications for court orders be made, by telephone, and outside of Court. Because no record was made of these applications for court orders, petitioner was thus left without effective right of appeal. Petitioner thereupon filed a motion for protective order with the United States District Court judge, complaining that the magistrate had "knowingly allowed and dogmatically directed the use of telephones as a means of entertaining complaints from plaintiffs' counsel and rendering rulings in respect thereof" and that, in the process "plaintiffs have engaged in ex parte communication" with "the Magistrate"

and that the magistrate "has knowingly encouraged and sanctions such ex parte communication, over the objection of movant herein". On hearing the motion, the United States District judge not only affirmed the magistrate's ruling, but also directed that all applications to the district court be made orally, by telephone, and outside of court. This ruling in its entirety reads:

> "Counsel are directed to conduct the taking of depositions at a place having enough telephones or a speaker phone so that all parties may be on the line should it become necessary to *contact the court for ruling on the telephone.*" (Italics added)

As a result of both rulings, all applications for court orders as to discovery disputes, at the election of plaintiffs' counsel, are to be made orally, by telephone, and outside of Court, and no record is made either of the applications, the objection or the rulings of the Court.

SUMMARY OF ARGUMENT

Rule 7(b) (1) of the Federal Rules of Civil Procedure in part pertinent reads:

> "An application to the court for an order shall be by motion which, unless made during the hearing or trial, *shall be in writing* * * * " (Italics added)

In order to insure the good faith nature of all motions filed with the Court, Fed.R.Civ.P., Rule 11, expressly provides that the signature of the attorney shall constitute a "certificate" by him that he has read the "pleading" and they are made after "reasonable inquiry" and is "warranted by existing law". It further provides that any motion signed "in violation of this rule" shall subject the author to "appropriate sanction". Thus, Rules 7 and 11 go to the very core of all litigations before the courts. They are crucial to judicial proceedings. No such rule can be "practically nullified" or repealed by a " district judge". Where this occurs, this Court has repeatedly stated that "it would not hesitate to restrain them". *Los Angeles Brush Manufacturing Corp. v. James*, 272 U.S. 701, 47 S. Ct. 286; *LaBuy v. Howes Leather Co.*, 352 U.S. 256, 77 S. Ct. 309; *In re Puerto Rico Electric Power Authority*, 687 F.2d 501.

Moreover, because all applications are orally made, and all objections likewise are orally made, and all rulings are orally rendered, there exists no record for appellate review. Filing at the trial court level has as one of its fundamental purposes, the making of a record and is thus crucial because federal appellate courts will not consider rulings or evidence which are not part of the trial record. *IBM v. Edelstein*, 526 F.2d 37.

The order of the magistrate as affirmed and supplemented by the order of the United States District Judge eliminates the writing requirement of Fed.R.Civ.P. Rule 7 and the integritity sanctions of Fed.R.Civ.P. Rule 11. These orders requiring oral applications and rulings rob petitioner of a record, "crucial" to appellate review. As a result, these orders deny petitioner of his due process rights endemic in his right to appellate review. These orders are therefore statutorily and constitutionally impermissable and must be reversed.

ARGUMENT

Twenty years ago, the same United States District Court, but presided over by a different judge, recognized and held that it was egregious and impermissible error for the Court to entertain an oral application for a court order. *Broome v. Simon*, 255 F.Supp. 434 (W.D.La.1965). The *Broome* court informed a witness who was scheduled to be deposed that she need not post-pone a planned vacation in order to do so, and that the Court would not hold her in contempt if she failed to appear. The Court so informed the deponent in the course of a telephone communication. Later, in response to the litigant's motion, the Court articulated the error in these words:

> "The court had the inherent power and authority to modify or even to quash the subpoena issued to Mrs. Gilfoil 28, U.S. C.A., F.R.Civ.P. Rule 30(b), 45(b), if in the opinion of the Court it was required to protect the witness from 'annoyance, embarrassment or oppression'. See Haney v. Woodward & Lothrop, Inc., 330 F.2d 940, 942 (4th Cir. 1964). *The fact that, as alleged in plaintiff's motion, the Court*

> *told her she could leave on her vacation and under these circumstances he would not hold her in contempt, and that this was done by verbal request was error on the part of the court. The proper mode of procedure would have been by written motion*. It would also be required that written notice of the action so taken be given plaintiff's attorney, which was not done." (italics added)

Id. at P. 437-48. Professor Moore cited the *Broome* decision with approval, saying:

> "The rules contemplate that judicial limitation of discovery under Rule 30(b) and (d) proceed through motion and notice and order. Thus it was held to be error for the judge to tell a witness that he need not appear for the taking of his deposition, though in the particular case the error was harmless."

J. Moore, *Moore's Federal Practice*, at ¶ 26.69 n.9

There can be no doubt that any application made pursuant to Rules 30 or 26 is an application for an order by the court. Any such application, when not made "during the hearing or trial" must be made in writing. In speaking to this, *Fed. R.Civ.P.* 7(b)(1) expressly provides:

> *"An application to the court for an order shall be by motion which*, unless made during a hearing or trial, *shall be made in writing*, shall state with particularity the

> grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." (italics added)

See also Joyner v. Berman Leasing Co., 398 F.2d 875 (5th Cir. 1968); *Sequoia Union High School District v. United States*, 245 F.2d 227 (9th Cir. 1957); *Mitchell v. Public Service Coordinated Transport*, 13 F.R.D. 96 (D.N.J. 1952) [oral motion at pretrial conference not allowed]; J. Moore, *supra*, at ¶ 7.05; *cf. Raughly v. Pennsylvania Railroad Co.*, 230 F.2d 387 (3rd Cir. 1956) [informal request to judge with no notice to opposing party cannot be considered a motion]. The taking of a deposition where no judge or magistrate is present and has had an opportunity to view the entire proceedings cannot fairly be characterized as a "hearing" or "trial" within the meaning of Rule 7. *Cf. Kirshner v. Palmer*, 7 F.R.D. 252 (S.D.N.Y. 1947) [pre-trial examination held in courthouse, in constructive presense of a judge, in order to permit parties to obtain immediate rulings on objections]. The "written motion" requirement of Rule 7 is couched in the mandatory language: "*shall* be made in writing". Thus, any application to the court for an order made pursuant to Rules 30 or 26 must be made in writing. To insist, over the objection of a litigant, that such application be made not only orally, but by telephone outside of court, is to create by judicial fiat a procedure expressly proscribed by Rule 7. It institutes a procedure which eschews record keeping and which bans appeals, or at the very least, renders appeals ineffective and meaningless.

The most that can favorably be said for the ruling that applications to the Court for an order shall be oral and by

telephone is that it is an innovative procedure, unknown to federal laws and the Federal Rules of Civil Procedure. But whether innovative, good, or bad, it works a nullification of the applicable federal rules mentioned. Because it does, the district court had no power to bring about such a change in the rules. (*U.S. Steel Corp. v. U.S.*, 43 F.R.D. 447 (S.D.N.Y. 1968).

The *U.S. Steel* court was confronted with an almost identical legal question. Plaintiff in that case gave notice to take a deposition by video camera and the defendant objected. The court, in summarizing the role of the Federal Rules of Civil Procedure in disputes concerning discovery, held:

> "It is elementary that in the absence of agreement between the parties an oral deposition *must* be taken in compliance with the rules." (cites omitted, itlalics added)

Id. 450, 451.

Responding to the argument that it was advantageous to take the deposition by video camera, the *U.S. Steel* court stated:

> "No useful purpose would be served by a discussion of the advantages and disadvantages of the use of a video tape recorder at this time. *This Court has no power to change the rules.* Neither are there any proposals with respect to proposed amendments to the Rules of Civil Procedure pertinent. The present Rules control presently-taken depositions. *Actually nothing in the proposed rules authorizes the use of a video*

tape recorder." (italics added)

Id. at 451.

In light of the fact that there is no rule which permits oral application, outside of court by telephone or otherwise, to the court for an order to be issued in connection with disputes arising at depositions, but on the contrary where Rule 7 expressly provides that such applications must be in writing, the district court had no discretion to act in contravention of the Federal Rules of Civil Procedure for the sake of convenience or otherwise.

The proposition that a magistrate cannot issue Rule 30(d) orders over the telephone is also supported by the well settled principle of construction known as "expression unius est exclusio alterius"; i.e., "the expression of one thing is the exclusion of the other". Simply put, where the Federal Rules of Civil Procedure contemplate that certain actions may be taken over the telephone, they expressly say so. Perhaps the best example of this appears in *Fed. R.Civ.P.* 30(b) (7), which permits the taking of depositions by telephone. Nowhere in Rule 30(d) does even the slightest suggestion that rulings or motions made thereunder may be made orally and over the telephone. In fact, as previously noted, the language of that provision appears to contemplate that the 30(d) motion process is a much longer and more complicated affair. Under the circumstances, it cannot be said that the magistrate's action, over petitioner's objection, in entertaining and ruling upon a Rule 30(d) motion over the telephone was proper. In *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229 (5th Cir. 1972, this court applied the rule of "expression unius est exclusio alterius", saying:

> "When the legislature has carefully employed a term in one section of a statue and has

> excluded it in another, it should not be implied where excluded. See, e.g., Federal Trade Oil Commission v. Sun Co., 1963, 371 U.S. 505, 514-414, 83 S.Ct. 358, 9 L.Ed. 2d 466 and J. Ray McDermott and Co. v. Vessel Morning Star, 5th Cir. 1972, 457 F.2d 815 (en banc)."

Id. at 233; *see also Rogers v. Frito-Lay*, 611 F.2d 1074 (5th Cir. 1980); *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668 (5th Cir. 1978). It is true that the Federal Rules of Civil Procedure are not, strictly speaking, a "statutory scheme" and were not enacted by a legislature. Nonetheless, the foregoing analysis does suggest that where the drafters of the Rules wished to authorize the transaction of court business over the telephone, they did so expressly. Hence, such authorization should not be read into sections of the rules where it does not expressly appear.

A written motion does more than just insure a permanent record, particularize issues presented, and the relief sought, and create the opportunity to a response in kind. *Fed.R. Civ.P.* Rule 7. Rule 7(3) expressly provides that "all motions shall be signed in accordance with Rule 11". Significantly, in part pertinent Rule11 provides:

> "Every * * motion * * shall be signed by at least one attorney of record in his individual name, whose address shall be stated. * * * The signature of attorney or party *constitutes a certificate* by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after *reasonable inquiry* it is well grounded in fact and is *warranted*

> by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harrass or to cause unnecessary delay or needless increase in the cost of litigation * * *. If a pleading, *motion*, or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party or both, an appropriate sanctions, which may include an order to pay to the other party or parties the amount of the reasonable expense incurred because of the filing of the * * * motion * * * including a reasonable attorney's fee." (italics added)

The United States District Court Rule 10, speaking to motions in subparagraph (c) Provides:

> "Every motion *shall* be signed by at least one attorney of record in his individual name, whose address shall be stated. The signature of an attorney *constitutes a certificate* by him that he has read the motion; that to the best of his knowledge, information and belief, there are good grounds to support it; and it is not interposed for delay." (italics added)

None of the purposes or goals envisioned by the filing of a written motion signed by an attorney or a party is present in verbalizing motions by telephone. Thus, the entire scheme of propriety, judicial rectitude, institutional dignity

and good faith conduct is destroyed or seriously impaired by the conduct of judicial business by telephone.

The consequences of the ruling by the district judge are awesome in their negative impact. The district judge not only affirmed the magistrate's order that all applications for orders be made orally, outside of court, and by telephone and that all orders granted likewise would be orally made, outside of court and by telephone, but the district judge held that "counsel are *directed* to conduct the taking of depositions at a place having enough telephones or a speaker phone so that all parties may be on the line should it become necessary to *contact the court* [district court] *for a ruling on the telephone*." Thus, the filing of a written motion at the trial level is prohibited and the hearing of such a motion in open court is equally banned. The effect of these orders is to deny to petitioner not only of the writing requirements of Rule 7, but of the right to have a record made of these applications and rulings for appellate review. This is error. *IBM v. Edelstein*, 526 F.2d 37 (2nd Cir. 1975).

In *Edelstein*, the appellate court granted a writ of mandamus to vacate an order of the trial judge whereby the parties were directed to present all papers to his office rather than being filed with the Clerk of Court. The appellate court ruled that such an order violated the provisions of F.R.D.P. 5. In so ruling the court held:

> "Filing at the trial court level with a view to 'making a record' is *crucial* because, absent extraordinary circumstances, federal appellate courts will not consider rulings or evidence which are not part of the trial record. (cites omitted). * * * Moreover, it is of *no avail* to an appellant that the

> trial court itself may have prevented him from including a particular item in the trial record; the appellate court will *not speculate* about the proceedings below, but *will rely only upon the record actually made*.
>
> * * *
>
> Since petitioner has no other means of pursuing his arguments to the appellate court--whether it is appellant or appellee--save by making the necessary record at the trial level, Judge Edelstein's refusal to file petitioner's motions has constituted an *impermissable interference* with *petitioner's right* to *make the record* it chooses for purposes of appeal." (footnotes omitted) (italics added)

Id. at 45, 46.

The district judge in *Edelstein* had further ordered that no oral motions would be allowed at trial. The court vacated that order as well, holding that it violated the provisions of F.R.C.P. 7 (b)(1). The court held that the exception to filing motions in writing contemplated by Rule 7 were those made at a "hearing" in which the "proceedings *are recorded*". See *Alger v. Hayes*, 452 F.2d 841 (8th Cir. 1972). The court further ruled:

> "As long as an oral motion is made during a proceeding which falls under Alger's liberal definition of 'hearing', the trial court cannot *refuse to tender it* or attempt *to exclude it from the record*, notwithstanding that

> the judge may reserve his decision on the motion until a later date." (italics added)

Id. at P. 843.

The order of Judge Shaw directing the making of oral motions, arguments and decisions over the telephone is unauthorized. The conduct of judicial business as directed by this order is not the type "hearing or trial" contemplated by Rule 7(b)(1) "in which the proceedings are recorded". The order of Judge Shaw therefore works a refusal "to tender it" (the motion) and is an attempt "to exclude it [the motion] from the record".

Such conduct and such absence of a record implicate petitioner's substantive and procedural due process rights. The fundamental requirements of due process generally call for an opportunity to be heard and noticed. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1967); *Hayes v. City of Wilmington*, 451 F. Supp. 696, 706 (D.Del. 1978). Due process is not provided unless this opportunity to be heard and noticed are "meaningful". *Armstrong v. Manzo*, *supra*, at 552. A litigant must be granted the right to present evidence and argument on the contested facts and legal issues. *See Jackson v. DeSoto Parish School Board*, 585 F.2d 725, 730 (5th Cir. 1978); *Hardy v. Johns-Manville Products Corp.*, 681 F.2d 334, 338 (5th Cir. 1982). Without a record and without the right of appeal, petitioner has been and continues to be denied of due process as the result of the ruling of the court nullifying the provisions of Rule 7.

The interlocutory order in question is a classic exemplar for the issuance of mandamus. The order instances not only a clear abuse of discretion, but a usurpation of judicial power concerning the enforcement of rules which by law

it is the duty of the district court to enforce. Rule 7 mandates that all applications to the court for an order, except in connection with the hearing or trial, "shall" be in writing. The order sub judice nullifies Rule 7 and directs that applications to the court for an order contemplated by Rule 7 shall be *not* in writing, but *orally* and then by telephone. The order further exemplifies a persistent violation of Rule 7, because the order sub judice sanctifies the earlier rulings of the magistrate that all applications for an order from the court must be orally made on the telephone and perpetuates the conduct of judicial business outside of a "hearing or trial" by *oral* applications, arguments and rulings over the telephone throughout the pendence of this very complex and eminently serious litigation.

Six decades ago this Court in *Los Angeles Brush Manufacturing Corp. v. James*, 272 U.S. 701, 47 S.Ct. 286, declared the use of mandamus appropriate to correct an interlocutory order which concerned the enforcement of rules. The district court in that case, over the objection of the defendant, referred trial of a patent violation action to a master to make his conclusions as to the facts in issue and recommend the judgment to be entered. Defendant applied directly to this Court for a writ of mandamus to compel the district court to vacate the order. In its application defendant asserted that it had "an established right under the equity rules to a trial in open court" and that the referral of patent cases to master constituted acts "in defiance of the plain intent of the equity rules". While observing that normally the intermediate appellate court possessed the power to issue mandamus in the case, this Court held:

> "However that may be, we think it clear that, where the subject *concerns the enforcement of the equity rules which by law it is*

> *the duty of this court to formulate and put in force*, then in a case in which this Court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the district court in requiring it to conform to them.
>
> * * *
>
> Rule 46 requires that in any trial in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or the rules, and that the court shall pass upon the admissability of all evidence offered as in actions at law. Equity Rule 59 provides that *save in matters of account*, a reference to a master *shall be the exception*, not the rule, and shall be made only upon a showing that some exceptional condition requires it * * *." (italics added)

Id. S.Ct 288.

This Court further noted that "were it to find that the rules have been practically nullified by a district judge * * * it would not hesitate to restrain them". But that is precisely the situation in petitioner's case. The action of the magistrate, as affirmed by the district court, has "practically nullified" Rule 7, which mandates that "an application to the court for an order shall be by motion which, unless during the hearing or trial, *shall be in writing*". (italics added). The district court, acting through the magistrate, had no legal power to reject, and thus nullify, the

mandatory provision of Rule 7 and the district court, acting through United States District Judge Shaw, had no power or discretion to refuse to reverse the action of the magistrate in nullfying Rule 7.

Thirty years ago, following the *Los Angeles Brush Manufacturing Corp.* decision, this Court again assessed the wisdom and need to issue mandamus where the subject concerns the enforcement of the rules of court which by law it is the duty of the courts to enforce. *LaBuy v. Howes Leather Co.*, 352 U.S. 256, 77 S.Ct. 309 (1957). In *LaBuy*, the district court in exercising its jurisdiction under then Rule 53(b), referred trial on the merits of an anti-trust lawsuit to a master. On application to the appellate court for a writ of mandamus to vacate the interlocutory order, the appellate court granted mandamus. On review, this Court affirmed the action of the appellate court, and in so doing quoted approvingly from *Los Angeles Brush Manufacturing Corp.*:

> " ' * * * [W]here the subject concerns the enforcement of the * * * [r]ules which by law it is the duty of the court to formulate and put in force', mandamus should issue to prevent such action thereunder *so palpably improper as to place it beyond the scope of the rule invoked.* As was said there at Page 707 of 272 U.S., at Page 289 of 47 S.Ct., were the Court ' * * * to find that the rules have been practically nullified by a district judge * * * it would not hesitate to restrain [him] * * *.' The Los Angeles Brush Mfg. Corp. case was cited as authority in 1940 for a per curiam opinion in McCllough v. Cosgrave, 309 U.S. 364, 60 S.Ct. 703, 84 L.Ed.

> 992, in which the court summarily ordered vacated the reference of two patent cases to a master. * * * We believe that supervisory control of the District Courts by the Courts of Appeals *is necessary to proper judicial administration in the federal system*." (italics added)

Id. S.Ct. 313, 314.

The Court in the matter of *In re Puerto Rico Electric Power Authority*, 687 F.2d 501 (1982) had occasion to issue a writ of mandamus to vacate an interlocutory order issued by the district court in connection with the wrongful enforcement of Rule 34 of the Federal Rules of Civil Procedure. The district court had issued an order compelling one of the parties litigant to pay the costs of translating into English documents whose production was requested by its adversary. The district court relied upon the provisions of Rule 34 to enter such an order. The writ of mandamus was granted on the court's finding that "the district court misread Rule 34 as authorizing it to require a shifting of the translation burden in the present situation where Congress intended none".

The distilled essence of the exceptional circumstances involved in the issue presented in petitioner's case is a hydra-headed legal misadventure: (a) the district court has practically nullified the writing requirements of Rule 7; (b) this usurpation of judicial power has been sanctioned before and is now destined to continue repeatedly for the duration of the pendency of this litigation, accordingly as the whim of plaintiffs' counsel shall dictate; (c) no record of the oral applications for court orders will be made, as contemplated by the applicable rules, and, as a result, there has existed and there will continue to exist no basis for review;

thus, no erroneous rulings will be correctable on appeal; (d) petitioner will thus be denied of substantive and procedural due process; (e) the action of the magistrate in rejecting the writing requirements of Rule 7, but, on the contrary in insisting that applications to the court for orders shall be *orally made*, and the knowing refusal of the district court judge to enforce the applicable federal rules by affirming the magistrate's refusal to comply with these rules, raise new and important issues of law, which reside in the very center of the administration of justice; and (f) petitioner has no adequate means of relief by appeal. The legal amalgam of these consequential offshoots of the district court's rejection of the applicable federal rules is that the district court, acting through the magistrate, has usurped judicial power not conferred by law, and the district court, acting through United States District Judge Shaw, has improperly failed to exercise jurisdiction conferred upon the court, by refusing to compel the magistrate to comply with the provisions of the applicable federal rules. In these circumstances mandamus must issue, if the integrity and viability of the applicable federal rules are to be maintained and if the substantive and procedural due process rights of petitioner are to be vindicated.

CONCLUSION

Fed.R.Civ.P. Rule 7(b) (1) is inflexible in its requirement that an application to the court for an order, when not made during a "hearing or trial" *shall* be in writing. The mandate of Rule 7 operates in tandem with Rule 11, which compels those making such applications to do so only after "reasonable inquiry" and then only where the moving party believes the remedy sought is "warranted by existing law". These rules, when obeyed, insure the making of a permanent record which exemplifies the particularized issues presented, the relief sought, and the rulings of the court rendered so that the litigant may have a record for appellate review.

The action of the magistrate and the ruling of the district court practically repeal and do away with the provisions of Rules 7 and 11. All applications for court orders as to discovery depositions are to be made orally, outside of court, and by telephone. No record is made of such applications and such rulings. In such a circumstance, any particularized issue presented, objection made, and ruling rendered will be the subject of partisan interpretation based on the quilet of the memorializing capability of the parties, their attorneys and the court. Obedience to such rulings will be as precarious as the memory of man is weak, and the avoidance of sanctions will be as uncertain as the caprice of the magistrate or the judge is mecurial. In the end, uncertainty will be the hallmark of justice in the area of pretrial discovery. Finally, and equally tragic, will be the fact that petitioner will be denied of any effective and meaningful appeal, because there will be no record of these applications, objections, and rulings.

It is respectfully submitted that a writ of mandamus

should issue immediately directed to the United States Court of Appeal, Fifth Circuit:

(a) ordering the appellate court to grant petitioner's earlier application for mandamus;

(b) alternatively, that the Honorable John M. Shaw, United States District Judge, Western District of Louisiana, Opelousas, Louisiana, be ordered to vacate the interlocutory order issued on June 18, 1985 which affirms the earlier magistrate's oral ruling, and which directs that applications for orders from the court arising in connection with the taking of discovery depositions be made orally, outside of court, and by telephone, and further ordering Judge Shaw to compel the magistrate to receive and act upon applications for orders of the court only when they are made in compliance with the requirements of the Federal Rules of Civil Proceedure, and particularly, when they are made in compliance with the writing requirements of Rule 7 of the Federal Rules of Civil Procedure, absent the knowing consent of all the parties to proceed in any other manner agreeable to the court and the rule of law.

Respectfully submitted,

J. MINOS SIMON, LTD.
1408 West Pinhook Road
Post Office Box 52116
Lafayette, Louisiana 70505
Telephone: (318) 233-4625

BY: J. Minos Simon per tt
J. MINOS SIMON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing application for writ of mandamus has been served upon the Honorable, Court of Appeal, Fifth Circuit, New Orleans, Louisiana, the Honorable John M. Shaw, United States District Judge, Western District of Louisiana, Opelousas, Louisiana and upon counsel of record on this 9th day of September, 1985.

J. Minos Simon per c.d.e.

J. MINOS SIMON
ATTORNEY FOR PETITIONER,
JOE E. FRYAR

COUNSEL OF RECORD TO BE SERVED

Stone, Pigman, Walther, Wittmann
& Hutchinson
546 Carondelet Street
New Orleans, Louisiana 70130-3588

Voorhies & Labbe
Post Office Box 3527
Lafayette, Louisiana 70502

Sessions, Fishman, Rosenson,
Boisfontaine, Nathan & Winn
601 Poydras Street
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Allen, Gooch, Bourgeois, Breaux
& Robison
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Lafayette, Louisiana 70502

Provosty, Sadler & deLaunay
Post Office Drawer 1791
Alexandria, Louisiana 71309

Deutsch, Kerrigan & Stiles
755 Magazine Street
New Orleans, Louisiana 70130

Lamothe & Hamilton
400 Magazine Street
New Orleans, Louisiana 70130

McGlinchey, Stafford, Mintz,
Cellini & Lang
643 Magazine Street
New Orleans, Louisiana 70139

Friday, Eldridge & Clark
2000 First Commercial Building
Little Rock, Arkansas 72201

Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, N.W.
Washington, D.C. 20036

Barrett, Smith, Schapiro, Simon
& Armstrong
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20040

Rubin, Curry, Colvin & Joseph
Suite 1400, One American Place
Baton Rouge, Louisiana 70808

Stafford, Stewart & Potter
Post Office Box 1711
Alexandria, Louisiana 71301

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL

VS.

POTOMAC INSURANCE CO. OF ILLINOIS, ET AL

CIVIL ACTION NUMBER 84-1786
SECTION O

ORDER

Filed: January 2, 1985

In response to the letter of J. Minos Simon to my office dated December 26, 1984, it is hereby ORDERED that the motion and issues addressed therein are referred to the magistrate for hearing and resolution. Accordingly, all inquiries and responses related to these motions and issues should be directed to the office of Magistrate Mildred Methvin.

Opelousas, Louisiana, January 2, 1985.

/s/ John M. Shaw
United States District
Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

EDWARD C. ABELL, JR., ET AL

versus

POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL

CIVIL ACTION NO: 84-1786-0
SECTION: "O"

MOTION FOR PROTECTIVE ORDER

Joe E. Fryar, appearing through undersigned counsel, respectfully moves the Court to grant a protective order as hereinafter particularized, in support whereof movant alleges that:

(1) Plaintiffs herein have taken and have scheduled the taking of the depositions of numerous witnesses by oral examination;

(2) Repeatedly, from time to time, during the taking of such oral depositions Plaintiffs, through their counsel, have disrupted the taking of such depositions for the purpose of seeking to obtain rulings from Magistrate Mildred E. Methvin, who has been assigned to receive and adjudicate discovery motions;

(3) Plaintiffs have sought rulings from Magistrate Methvin through the utilization of telephone facilities and Magistrate Methvin has knowingly allowed and dogmatically directed the use of telephones as a means of entertaining complaints from plaintiffs' counsel and rendering rulings in respect thereto;

(4) Joe E. Fryar, through his counsel of record, has expressly and vigorously objected to Magistrate Methvin conducting official court proceedings over telephone facilities instead of requiring compliance with the provisions of the Federal Rules of Civil Procedure which mandate that all such complaints or motions shall be in writing;

(5) In the process of conducting judicial business on the telephone, plaintiffs have engaged in ex parte communication with Magistrate Methvin, and Magistrate Methvin has knowingly encouraged and sanctioned such ex parte communication, over the objection of movant herein;

(6) The last event when plaintiffs sought to conduct judicial business over the telephone, and Magistrate Methvin sanctioned, approved and directed the use of the telephone for the conduct of judicial business, over the objection and protest of movant's counsel, occurred during the taking of the deposition of Rodney D. Kendrick, Jr. on April 1, 1985 in Alexandria, Louisiana; on that occasion, with full reservation of his objection, movant verbalized his appeal from Magistrate Methvin's ruling, but Magistrate Methvin refused to heed the effects of the appeal and continued her oral ruling in force and effect to the prejudice of movant's right under the Federal Rules of Civil Procedure.

WHEREFORE, movant respectfully prays that a protective order shall be granted herein whereby plaintiffs shall be

prohibited from seeking or otherwise processing any discovery motions during oral examination or otherwise by the use of telephone facilities or in any manner other than that prescribed by the Federal Rules of Civil Procedure and absent the consent of the parties involved.

J. MINOS SIMON, LTD.
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Post Office Box 52116
Lafayette, Louisiana 70505
Telephone: (318) 233-4625

By: /s/ J. MINOS SIMON
ATTORNEY FOR JOE E. FRYAR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing "Motion for Protective Order" has been served upon counsel of record by depositing it in the United States Mail, postage prepaid and properly addressed, this 26th day of April, 1985.

/s/ J. MINOS SIMON

STATE OF LOUISIANA
PARISH OF LAFAYETTE

AFFIDAVIT

J. MINOS SIMON, being first duly sworn, did depose and say that:

(1) He is counsel for Joe E. Fryar in connection with the captioned matter;

(2) He was participating as counsel for Joe E. Fryar during the taking of the deposition of Rodney D. Kendrick on April 1, 1985 at Alexandria, Louisiana, a deposition by oral examination initiated by plaintiffs herein;

(3) During the course of the taking of the deposition of Kendrick, plaintiffs' counsel, Ms. Judy Barrasso, sought, over the objection made by Fryar's counsel, to exclude a Mr.Ralph Sisco from those in attendence during of the taking of the deposition. When Mr. Sisco insisted on his right to be in attendence, over the objection of counsel for Joe E. Fryar, Ms. Barrasso called Magistrate Methvin by telephone and presented a request to Magistrate Methvin to issue an order directing Mr. Sisco to leave the place where the deposition was being taken;

(4) Fryar's counsel communicated Fryar's objection to Magistrate Methvin conducting judicial business on the telephone. Magistrate Methvin ignored the objection and proceeded to engage in an ex parte communication with Ms. Barrasso and verbalized a ruling favorable to Ms. Barrasso's request and then hung up the telephone;

(5) Ms. Barrasso thereafter communicated to those present what purported to be Magistrate Methvin's ruling, which only Ms. Barrasso had heard during her ex parte telephone conversation with Magistrate Methvin;

(6) Fryar's counsel then called Magistrate Methvin on the telephone to receive from Magistrate Methvin personally the nature and content of the alleged ruling; on communicating by telephone, Magistrate Methvin confirmed that she had issued the order communicated by Ms. Barrasso;

(7) Fryar's counsel, with full reservation of his objection to conducting judicial business on the telephone, announced to Magistrate Methvin that Fryar was suspensively appealing from her ruling; Magistrate Methvin ignored the appeal and insisted that the ruling be carried out, and accordingly Ralph Sisco was ejected from the deposition room;

(8) Affiant further states that the attached excerpt of Kendrick's deposition, which exemplifies the colloquy between counsel leading up to the telephone conversation with Magistrate Methvin, appearing at Pages 60-63 of Kendrick's deposition is a true and correct extract of that deposition and exemplifies Fryar's objection to conducting judicial business over the telephone.

FURTHER AFFIANT SAYETH NOT.

/s/ J. MINOS SIMON

SWORN TO AND SUBSCRIBED
before me, the undersigned
authority, at Lafayette,
Louisiana, this
day of April, 1985

/s/ Lawrence N. Curtis
NOTARY PUBLIC

* * * *

who you are. We just want to have your appearance on the record.

MR. SISCO: Ralph Sisco.

MR. BARRASSO: Okay. Since you are going to be a witness, Mr. Sisco, we ask that you not be present during this deposition. It's your testimony to be taken this afternoon.

MR. SIMON: Well, I object to that.

MS. BARRASSO: Well, he's not a party to this proceedings, Mr. Simon.

MR. SIMON: That's all right. If he wants to be present he can. You didn't get a Protective Order.

MS. BARRASSO: Well, we can move to get one right now.

MR. SIMON: You can do what you want to do, but I'm not going to join you in a telephone motion, that's for sure.

MS. BARRASSO: Are you representing Mr. Sisco, Mr. Simon?

MR. SIMON: Listen, you know who I am representing, and I am telling you that I am objecting to your instruction to this witness to leave the room. You had the right to get a Protective Order if you had wanted to exclude the witnesses from hearing each other and you have not done so. And I am letting him know that if he wants to stay that he can stay.

MS. BARRASSO: Well, Mr. Simon, I think it's assumed that the witnesses will not be present during the deposition of the other parties or witnesses.

MR. SIMON: I'm sorry what you assume. I am just telling you --

MS. BARRASSO: And we would ask you, Mr. Sisco, that you not be present during the depositions of the other parties or witnesses. And if you insist, then, you know, we will take proper steps.

MR. SIMON: You can take whatever steps you want. I am responding to your instruction, and I am telling you -- I am informing him that I represent Mr. Fryar, and as far as I am concerned his presence here is welcome if he wants to be here.

MS. BARRASSO: Mr. Sisco, we have asked that you leave, and I want to ask you what your response is?

MR. SISCO: My request is to stay. Of course, if you do something that legally bars me from the proceedings then I will go.

MS. BARRASSO: Okay. We are going to take a recess and we'll contact the Magistrate.

MR. SIMON: Let the record show that I object to taking a recess to contact the Magistrate because I know of no rule of law or procedure that authorizes any conducting of official court business on the telephone. And I think that at a later time -- I am reserving my right to file a Motion for Attorney Fees and Costs for the disruption of this deposition.

(Following a brief recess during which the magistrate was called and Mr. Sisco left the proceedings, the following proceedings were had:)

MS. BARRASSO: Can you tell us where we are?

(Whereupon, the court reporter read back as follows:)

Q. Now, at the time they approached you, who else was involved in the project?

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
in Opelousas

June 18, 1985

PRESENT: HON. JOHN M. SHAW, JUDGE, Presiding
Mildred Baker, Minute Clerk

COURT OPENED: 9:30 AM
COURT ADJOURNED: 12:30 PM

MINUTES OF COURT

EDWARD C. ABELL, ET AL

versus

POTOMAC INSURANCE CO. OF ILLINOIS, ET AL

CASE NO. 84-1786
SECTION O

APPEARANCES

Kyle Schonekas	for	Plaintiffs
Michael R. Allweiss	for	Mintz, Levin, Cohn, Ferris, Glovsky & Popeo and Wallace C. Turbeville
John Gregory Odom	for	National Union Fire Insurance Co.
J. Minos Simon	for	Joe E. Fryar

John P. Wolff, III	for	Wright, Lindsey & Jennings
Kelly Mangum and Melanie M. Hartmann	for	All American Services
Howard J. Ettinger	for	Potomac Ins., John W. Peck and Peck, Shaffer and Williams

CASE CALLED FOR **FILINGS:**

[x] Hearing on motions
[ ] Jury selection only
[ ] Trial with/without jury
_____ day
[ ] Other _____

PROCEEDINGS:

[ ] Witnesses sequestered
[ ] Opening statement - plaintiff
[ ] Opening statement - defendant
[ ] Testimony & evidence for pltf., not concluded
[ ] Testimony & evidence for deft., not concluded
[ ] Rebuttal testimony & evidence, not concluded
[ ] Evidence closed
[ ] Evidence left open for _____
[ ] Case argued
[ ] Jury instructed
[ ] Alternate juror(s) excused
[ ] Jury deliberations began at _____ AM/PM
[ ] Jury verdict returned at _____ AM/PM
[ ] Jury polled
[ ] Case ruled on by the Court - See below
[ ] Case taken under advisement
[ ] Briefing times - See below
[ ] Mistrial declared

JURORS SELECTED & SWORN TO TRY CASE:

(1) _____
(2) _____
(3) _____
(4) _____
(5) _____
(6) _____
(7) _____
(8) _____
(9) _____
(10) _____
(11) _____
(12) _____
_____
_____

VERDICT, RULING, COMMENTS:

Motion on behalf of plaintiff to amend class certification order argued, submitted and GRANTED.

Motion on behalf of Joe Fryar for protective order to prohibit plaintiffs seeking or obtaining rulings via telephone from the Magistrate during depositions argued, submitted and DENIED. However, counsel are directed to conduct the taking of depositions at a place having enough telephones or a speaker phone so that all parties may be on the line should it become necessary to contact the Court for a ruling on the telephone.

Motion on behalf of Wallace C. Turbeville and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo to dismiss argued, submitted and GRANTED as to indemnity. Third party plaintiffs Potomac Ins., John W. Peck and Peck, Shaffer & Williams are directed to amend their third party complaint within ten days to state a claim under Rule 10b-5.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4478

IN RE:

JOE E. FRYAR,

Petitioner.

On Petition for Writ of Mandamus from the
United States District Court for
the Western District of Louisiana

Filed July 18, 1985

BEFORE: GEE, RANDALL and DAVIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is denied.

APPENDIX E

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF LOUISIANA LAFAYETTE DIVISION

Civil Action

No. CV 84-1786

Section C

Magistrate Div.

Jury Trial Demanded

EDWARD C. ABELL, FR. AND CAREY WALTON
PLAINTIFFS

versus

POTOMAC INSURANCE COMPANY OF ILLINOIS, NATIONAL UNION FIRE INSURANCE COMPANY, JOE E. FRYAR, HANCOCK, JOSEPH & DANIELS, JOSEPH HANCOCK, SWINK & CO., INC., WILLIAM E. SKYE, JOHN W. PECK, PECK, SHAFFER & WILLIAMS, WRIGHT, LINDSEY & JENNINGS, ABC INSURANCE COMPANY, and RODNEY KENDRICK,
DEFENDANTS

Filed July, 1984

COMPLAINT IN A CLASS ACTION UNDER THE SECURITIES ACT OF 1933, THE SECURITIES EXCHANGE ACT OF 1934, RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT, THE LOUISIANA BLUE SKY LAW, AND OTHER LAWS

1. Edward C. Abell, Jr. ("Abell") and Carey Walton ("Walton"), plaintiffs, bring this class action on behalf

of themselves and on behalf of all others similarly situated, in accordance with Rule 23 of the Federal Rules of Civil Procedure, to rescind purchases of certain securities, to recover the amounts paid and damages suffered as a result of the purchases of certain securities and as a result of violations by certain defendants of the securities laws of the United States and of the State of Louisiana, of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as of other laws hereinafter set forth and demanding a trial by jury, complain and allege as follows:

PARTIES

Plaintiffs

2. Abell and Walton, individuals of the full age of majority, respectively domiciled in the Parish of Lafayette and Parish of St. Landry, State of Louisiana, are purchasers of some of the $13,550,000 Westside Habilitation Center Revenue Bonds (Intermediate Care Facility for the Mentally Retarded) (hereinafter referred to as the "Bonds").

3. The persons who constitute the class of purchasers of Bonds (hereinafter referred to as "Bond Purchasers") are so numerous that joinder of all members is impracticable; these are questions of law and fact common to the entire class; the claims of Abell and Walton are typical of the claims of the entire class; and Abell and Walton will fairly and adequately protect the interests of the entire class.

Defendants

4 The following defendants hereinafter may be referred to collectively as the "Fryar Group":

a. Joe E. Fryar ("Fryar") is an individual of the full age of majority, domiciled in the Parish of Rapides, State of Louis-

iana. At all times pertinent hereto, Fryar was a promoter and the developer of the Westside Habilitation Center project ("Westside").

b. Rodney Kendrick ("Kendrick") is an individual of the full age of majority domiciled in the Parish of Rapides, State of Louisiana. At all times pertinent hereto, Kendrick was a promoter of Westside and the chairman of the Board of Directors and President of the non-profit corporation known as Westside Habilitation Center ("Westside, Inc.").

5. The following defendants hereinafter may be referred to collectively as the "Hancock Group":

a. Hancock, Joseph & Daniels ("HJD") is a corporation organized under the laws of Arkansas, domiciled and with its principal place of business in Little Rock, Arkansas. At all times pertinent hereto, HJD was a registered brokerdealer transacting business within the Western District of Louisiana. HJD was an underwrtier for the offering to the public of lic of the Bonds and, in truth and fact, is the alter ego of Joseph D. Hancock.

b. Joseph D. Hancock ("Hancock") is an individual of the full age of majority, domiciled in Little Rock, Arkansas. At all pertinent times hereto, Hancock was an owner, the president, chief operating principal, and sole registered representative of defendant HJD. Han-

cock also acted as a promoter of Westside.

6. The following defendants hereinafter may be referred to collectively as the "Swink Group":

a. Swink & Co., Inc. ("Swink") is a corporation organized under the laws of Arkansas, domiciled and with its principal place of business in Little Rock, Arkansas. At all times pertinent hereto, Swink was a registered broker-dealer transacting business within the Western District of Louisiana. Swink was an underwriter for the offering to the public of the Bonds

b. Upon information and belief, Wright, Lindsey & Jennings ("WLJ") is and was a partnership organized under the laws of the State of Arkansas, domiciled and with its principal place of business in Little Rock, Arkansas. At all times Pertinent hereto, WLJ acted as counsel for the underwriters, including HJD and Swink, in connection with the issuance of the Bonds, and in that capacity was to perform the "due diligence" investigation on behalf of the underwriters.

7. William E. Skye ("Skye") is an individual of the full age of majority, domiciled in the Parish of Rapides, State of Louisiana. At all times pertinent hereto, Skye was a promoter of Westside and acted as counsel for West-

side, Inc. in connection with the offering to the public of the Bonds, and in the latter capacity was to perform the "due diligence" investigation on behalf of Westside, Inc.

8. The following defendants hereinafter may be referred to collectively as the "Peck Group":

a. John W. Peck ("Peck") is an individual of the full age of majority, domiciled in Cincinnati, Ohio. At all times pertinent hereto, Peck acted as bond counsel in connection with the offering to the public of the Bonds, and in that capacity owed a duty, *inter alia*, to disclose material facts to prospective Bond Purchasers.

b. Peck, Shaffer & Williams ("PSW") is and was a partnership organized under the laws of the State of Ohio, domiciled and with its principal place of business in Cincinnati, Ohio. At all times pertinent hereto, PSW acted as bond counsel in connection with the offering to the public of the Bonds, and in that capacity owed a duty, *inter alia*, to disclose material facts to prospective Bond Purchasers.

9. The following defendants hereinafter may be referred to collectively as the "Insurance Companies":

a. ABC Insurance Company ("ABC") is an unknown foreign insurance corporation, licensed to do and doing business

within the State of Louisiana. At all times pertinent hereto, ABC had in full force and effect a professional liability policy of insurance, issued to and on behalf of WLJ. Accordingly, ABC Insurance Company is liable to Abell, Walton and all other Bond Purchasers for the damages caused by the acts and omissions of WLJ as alleged herein, pursuant to La. R.S. 22:655.

b. National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") is a foreign insurance corporation domiciled and with its principal place of business in Pennsylvania, and is licensed to do and doing business in the State of Louisiana. At all times pertinent hereto, National Union had in full force and effect a professional liability policy of insurance, issued to and on behalf of Skye. Accordingly, National Union is liable to Abell, Walton and all other Bond Purchasers for the damages caused by acts and omissions of Skye as alleged herein, pursuant to La. R.S. 22:655.

c. Potomac Insurance Company of Illinois ("Potomac") is a foreign insurance corporation domiciled and with its principal place of business in Illinois, licensed to do and doing business within the State of Louisiana. At all times pertinent hereto, Potomac had in full force and effect a professional liability

policy of insurance, issued to and on behalf of Peck and PSW. Accordingly, Potomac is liable to Abell, Walton and all other Bond Purchasers for the damages caused by the acts and omissions of Peck and PSW, as alleged herein, pursuant to La. R.S. 22:655.

10. The term "defendants" hereinafter shall mean the defendants collectively, with the exception of the Insurance Companies unless otherwise specified.

JURISDICTION

11. The jurisdiction of the Court over Counts One and Two of this action is invoked under Section 22 of the Securities Act of 1933, as amended (the "Securities Act"), to enforce claims arising under Sections 12(1) and 12(2) of the Securities Act; the jurisdiction of this Court over Count Three is invoked under Section 27 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to enforce claims arising under Section 10(b) of the Exchange Act and Rule 10b-5 of the Securities and Exchange Commission; the jurisdiction of this Court over Count Four is invoked under Section 1964 of Title 18 of the United States Code, being a part of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to enforce claims arising under Section 1962 of Title 18 of the United States Code; and the jurisdiction of this Court over the remaining counts is invoked under this Court's pendant jurisdiction.

VENUE

12. Each defendant named in this Complaint maintains an office, transacts business, has an agent, committed an act, conducted a transaction, is domiciled in or had substantial contacts in the Western District of Louisiana.

GENERAL ALLEGATIONS

13. Commencing during or prior to the year 1976, and continuing through and including 1982, the Fryar Group, the Hancock Group, and Skye embarked upon a scheme and a pattern of racketeering activity for the purpose of enriching themselves by and through the issuance and offering to the public of revenue bonds, the proceeds of which were to be used to construct an intermediate care facility for the mentally retarded.

14. More particularly, the Fryar Group, the Hancock Group and Skye caused the formation of the non-profit corporation, Westside, Inc., the issuance of the Bonds to the public, and the use of the proceeds of the Bonds to finance the acquisition and construction of Westside at grossly inflated prices.

15. Pursuant to the scheme, Fryar and Charles S. Bollinger ("Bollinger") purchased approximately 6.47 acres of land, including a vacant school building, in Cheneyville, Louisiana (hereinafter referred to as the "Cheneyville Property"), from the Rapides Parish School Board on or about January 3, 1978 for the sum of $100,00. On or about August 16, 1979, Fryar purchased Bollinger's interest in the above-described property by assuming a mortgage on the land and building.

16. The Fryar Group, the Hancock Group, and Skye thereafter organized and incorporated Westside, Inc. A five member board of directors was appointed, with Kendrick assuming the position of Chairman and President.

17. To facilitate their scheme by enhancing the marketability of the Bonds, the Fryar Group, the Hancock Group, and Skye decided to elicit the approval of the Town of

Cheneyville, to issue the Bonds on its behalf ostensibly so that interest earned on the Bonds would be exempt from federal income tax. For this reason, Fryar presented a plan for construction of Westside to the Town Council of Cheneyville, which plan subsequently was approved by resolution.

18. During the summer of 1981, the Fryar Group, the Hancock Group, and Skye began to finalize their scheme to issue to the Bonds to finance the acquisition and construction of Westside. Toward that end, Peck, PSW, and WLJ, were retained to act as bond counsel and as counsel to the underwriters. In addition, Swink was retained, together with HJD, to underwrite the issuance.

19. During the late summer or fall of 1981, the Fryar Group, the Hancock Group and Skye caused a consulting firm to conduct a market and feasibility study concerning Westside (the "Feasibility Study"). On information and belief, the results of the Feasibility Study were unfavorable.

20. Defendants knew or should have known through the exercise of due diligence that the Feasibility Study was conducted, with adverse results.

21. Further, in or about the summer of 1981, the State Developemental Disabilities Planning Council strongly opposed construction of Westside on the ground that the State of Louisiana was experiencing an overavailability of beds for the type of clientele to be served by Westside, a fact defendants knew or should have known through the exercise of due diligence.

22. Notwithstanding the opposition to Westside and the adverse results of the Feasibility Study, the defendants agreed to proceed with the scheme to market the Bonds.

Toward that end, defendants agreed that Westside, Inc. would issue to the public $13,550,000 of revenue bonds through sale of the Bonds at a substantial discount to HJD and Swink, which, in turn, would resell the Bonds to the public at face value. HJD and Swink were to receive a profit exceeding $1,000,000 from the initial sale to the public.

23. Defendants further agreed that $2,459,700 of the proceeds received from the sale of the Bonds to the public was to be used by Westside, Inc. for the acquisition of the Cheneyville Property. The price to be paid by Westside, Inc. was greatly in excess of that paid by Fryar in 1978 and 1979, notwithstanding that no improvements had been made to that property.

24. To conceal the scheme to have Westside purchase for $2,459,700 the same Cheneyville Property acquired by Fryar for a substantially lesser sum, Fryar, assisted by Skye (who drafted and notarized the relevant documents for the transaction, including the act of sale), Hancock, Kendrick and others, sold the property for $150,000 in late 1981 to All American Service Company, Std., also doing business as AA Service Company, Ltd. ("All American"), a Bermuda corporation. Payment to Fryar of the $150,000 purchase price by All American was conditioned upon the subsequent sale of the Cheneyville Property to Westside for $2,459,700.

25. Upon information and befief, All American, in truth and fact, is the alter ego of Fryar and Hancock, and was organized, in effect, to accomplish this transaction.

26. Defendants knew or should have known through the exercise of due diligence that Westside was to purchase the Cheneyville Property, in effect, from Fryar and Hancock,

at a price in excess of $2,000,000 over Fryar's purchase price.

27. In accordance with the general scheme, the Bonds were to be issued by Westside, Inc. pursuant to an indenture of trust (the "Indenture") between Westside, Inc. and a corporate trustee (the "Trustee"). Fryar was then to enter into a development agreement with Westside, Inc. (the "Development Agreement"), providing for the construction of the Westside facility on the Cheneyville Property for a cost in excess of $5,000,000. Fryar individually was to receive fees in excess of $900,00 under the Development Agreement.

28. To secure performance of his obligations under the Development Agreement, Fryar was obligated to purchase and deliver to the Trustee Bonds in an aggregate principal amount of $2 million dollars. Fryar thus was to have $2 million dollars of his personal funds at risk as security for the performance of his obligations.

29. Ostensibly to comply with this obligation, the defendants agreed that the $2,459,700 to be paid from the Bond proceeds to acquire the Cheneyville Property would, in part, be used to purchase the $2 million of Bonds Fryar was required to deliver to the Trustee as security. Structuring the transaction in this manner relieved Fryar of the obligation to put his own funds at risk to secure performance of his obligations.

30. To conceal the transaction whereby Fryar would purchase the $2 million of Bonds with the profit received from the sale to Westside of the Cheneyville Property, the defendants caused the ownership of the $2 million dollars of Bonds to be registered in the name of All American.

31. In furtherance of the scheme to offer to the public the Bonds, the defendants participated in the preparation of a prospectus ("Official Statement"), for use in offering and selling the Bonds to the public. In addition, the defendants participated in the preparation on the Indenture, legal opinions, and other documents required to effect the issuance of the Bonds.

32. Included in the Official Statement are the results of a second feasibility study the Fryar Goup, the Hancock Group, Skye, and the Swink Group caused to be conducted by Real Estate Research Corporation (the "Research Study"). The Fryar Group, the Hancock Group, the Swink Group,and Skye advised Real Estate Research Corporation, among other things, that the Cheneyville Property was acquired for $2,459,700, and could be depreciated on that basis, when in fact part of the purchase price allegedly was to compensate All American for the performance of services to Fryar. Based on this information, among other things, Real Estate Research Corporation concluded that the project was feasible.

33. The Official Statement further included assurances to investors that the proceeds of the Bonds would be invested only in high security investments. The Official Statement states, *inter alia*, that the monies held in the various funds or accounts created under the Indenture would be invested only in "Qualified Investments". "Qualified Investments" is defined in the Indenture and Official Statement as, among other things, interest bearing time deposits or certificates of deposit issued by national banks and continuously collateralized with "seasoned single family mortgages."

34. The defendants further agreed that $8,704,517.00 of the proceeds of the Bonds would be invested in high interest rate certificates of deposit issued by Penn Square

National Bank of Oklahoma City, Oklahoma ("Penn Square"). The investment was to be collateralized with the pledge of "seasoned single family mortgages" and government obligations. Pursuant to this agreement, Hancock, Peck, PSW, Skye, and WLJ, among others, participated in the drafting of an investment agreement (the Investment Agreement), which was to be entered into and, which was in fact, entered into by the Trustee and Penn Square, providing for the investment of the Bond proceeds as described above.

35. At the time that defendants agreed to invest $8,704,-517.00 of the Bond proceeds in certificates of deposit issued by Penn Square, the defendants knew or should have known in the exercise of due diligence that Penn Square was experiencing serious financial difficulties, and, in fact, was about to be placed into receivership by the Comptroller of the Currency.

36. At the time the Investment Agreement was prepared and executed, the Peck Group, the Hancock Group, the Swink Group and Skye knew or should have known that Penn Square could not validly collateralize the investment of the Bond proceeds with "seasoned single family mortgages" or with the pledge of any of its assets under the federal banking laws and regulations, and under applicable state law. Therefore, the Bond proceeds were not being invested in "Qualified Investments", contrary to the representations contained in the Official Statement.

37. During April of 1982 and thereafter, the defendants engaged in efforts to solicit the purchase of the Bonds from persons and entities in Louisiana and elsewhere through, among other things, the use of the Official Statement and accompanying documents, including, but not limited to, legal opinions rendered by Peck, PSW and Skye concern-

ing the validity and enforceability of the Indenture. Alternatively, the Fryar Group, the Peck Group, and/or Skye aided and abetted the Hancock Group and the Swink Group in the sale of the Bonds. Without the substantial participation of the Fryar Group, the Peck Group, and Skye, and more particularly, without the legal opinions rendered by Peck, PSW, and Skye, the Bonds could not and would not have been sold to Abell, Walton and the other Bond Purchasers.

38. In connection with the solicitation of purchasers and the sale of the Bonds, defendants, for the purpose of executing their scheme, placed or caused to be placed in an authorized depository for mail matter, copies of the Official Statement and other documents to be sent or delivered by the Postal Service to prospective investors, including Abell and Walton. Further for the purpose of executing their scheme, defendants transmitted or caused to be transmitted by means of wire, and other means of interstate communication, writings, signs, signals, pictures or sounds.

39. The Bonds were not registered with the Securities and Exchange Commission, as required by Section 5 of the Securities Act, nor were the Bonds registered with the Louisiana Commissioner of Securities, as required by La. R.S. 51:706.

40. Through the United States mail, plaintiffs received various documents transmitted by defendants and concerning the Bonds. Additionally, oral representations concerning the Bonds were made to plaintiffs by Swink, on its behalf and on behalf of all other defendants.

41. Included among the representations made to Abell, Walton and all other Bond Purchasers by the means referred to in the preceding paragraphs were the following:

(a) That construction and operation of Westside was viable and feasible;

(b) That Westsides's revenues and the monies earned through investment of the Bond proceeds were adequate to finance the necessary costs of constructing and operating Westside, and servicing of its debt, including the interest owed Bond Purchasers;

(c) That acquisition of the Cheneyville Property legitimately would cost $2, 459,700;

(d) That the Indenture is valid and enforceable as to its terms;

(e) That the interest earned on the Bonds is exempt from federal income tax;

(f) That the restrictions in the Indenture placed on the investment of the Bond proceeds provided a high degree of security for Bond Purchasers; and,

(g) That a national bank validly could pledge its assets to secure the investment of Bond proceeds.

42. In reliance, *inter alia*, on the written and oral representations made by defendants, and on the Bonds' availability in the marketplace as an indication of their genuineness, Abell and Walton each purchased Bonds. Abell purchased one Bond in the face amount of $5,000 during or

about the summer of 1982, and Walton purchased two Bonds in the face amount of $5,000 each on or about April 7, 1982.

43. Abell and Walton only recently learned that many of the oral and written representations made to them were false and misleading in many particulars. Moreover, defendants omitted material facts necessary to make the oral and written representations not misleading, including, but not limited to, the following:

(a) That Fryar originally purchased the Cheneyville Property for an amount substantially less than the amount Westside, Inc. was pay for that same property;

(b) That Fryar agreed to sell the Cheneyville Property to All American for $150,000, with payment of the purchase price to Fryar conditioned upon the subsequent sale of the Cheneyville Property to Westside, Inc. for $2,459,700;

(c) That Fryar's obligation to purchase and pledge $2 million worth of Bonds as security for performance of his obligations under the Development Agreement would be satisfied by using part of the $2,459,700 purchase price paid by Westside, Inc. to All American out of the Bond proceeds, resulting in Fryar not having any of his own funds at risk.

(d) That the Feasibility Study concerning Westside had been conducted and contained an adverse opinion as to the feasibility of Westside;

(e) That All American and/or Fryar and Hancock received a profit or fee in excess of $2,000,000 for acquiring the Cheneyville Property;

(f) That Fryar and/or Hancock and others are the true or beneficial owners of in excess of $2.8 million of Bonds acquired with the profits from the sale to Westside, Inc. the Cheneyville Property;

(g) That Fryar orally entered into an agreement with All American whereby All American would fulfill Fryar's commitments under the Development Agreement to provide security for his performance thereunder;

(h) The relationship between Fryar, Hancock, and All American;

(i) That the disbursements of $5,284,634 under the Development Agreement included payments to Fryar in excess of $900,000;

(j) That Westside likely would be unable to service its debt or make the interest payments to the Bond Purchasers;

(k) That as of the date the Bonds were first issued to the public, a separate Investment Agreement had been entered into between the Trustee and Penn Square directing that the proceeds from the sale of the Bonds be, in part, invested in certificates of deposit issued by Penn Square and secured by the pledge of "seasoned single family mortgages" and other assets of Penn Square;

(l) That as of the date the Investment Agreement was prepared and executed, Penn Square, in which a major part of the Bond proceeds was to be invested, was experiencing serious financial problems, and, in fact, was about to be placed in receivership by the Comptroller of the Currency;

(m) That the Westside Bonds were worth far less than their purported value, and in fact were worthless;

(n) That the conclusion of the Research Study that Westside was feasible was based in part upon an assumption that the $2,459,700 purchase price of the Cheneyville Property was a valid one and that the Cheneyville Property could be depreciated on that basis;

(o) That the conclusion of the Research Study that Westside was feasible was based in part upon the erroneous legal

opinions rendered by Peck, PSW, and skye, that the terms of the Indenture were valid and enforceable; and,

(p) That the State Developmental Disabilities Planning Council strongly opposed construction of Westside on the ground that the State of Louisiana was xperiencing an overavailability of beas for the type of clientele to be served by Westside.

44. Defendants knew or should have known the truth by the exercise of due diligence but intentionally or by severe recklessness made untrue statements of material facts and/or omitted to state material facts necessary in order to make the statements, in light of the circumstances in which they were made, not misleading, to Abell, Walton and other Bond Purchasers in the respects, among others, set forth herein.

45. Because, *inter alia*, of the facts that the Westside project was not feasible; that more than $2 million of the Bond proceeds publicly represented as being intended for use of the facility, in fact, were paid as a profit or as a fee to Fryar, Hancock, and/or HJD; that Fryar additionally received in excess of $900,000 in fees; and that Penn Square could not validly collateralize the investment of $8,704,-517.00 thereby resulting in a loss of $8,704,517.00, together with interest, when Penn Square was placed into receivership, Westside has been unable timely to pay the interest due Bond Purchasers and, upon information and belief, will not be able to pay the interest due holders of the Bonds on October 1, 1984.

46. If Abell, Walton and other Bond Purchasers similarly situated had been fully informed of the true material facts by defendants, they would not have purchased the Bonds.

47. The Westside Bonds are worthless, resulting in Abell, Walton and the other Bond Purchasers suffering a complete and total loss of their investments, together with future interest payments.

48. The losses incurred and to be incurred by Abell, Walton and the other Bond Purchasers similarly situated are the direct consequences of the actions of the defendants, as set forth herein.

49. Abell and Walton and all other Bond Purchasers similarly situated hereby tender to the defendants their Bonds, contingent upon the granting of the relief prayed for in this Complaint.

50. Abell and Walton did not discover and in the exercise of reasonable diligence could not have discovered the facts giving rise to the causes of action set forth herein more than one year preceding the filing of this Complaint.

COUNT ONE
SECURITIES ACT: SECTION12(1)

51. All of the preceding allegations of this Complaint are incorporated herein by reference.

52. The Westside Habilitation Center Revenue Bonds constitute "securities" as that term is defined in the Securities Act.

53. The solicitation, purchase and/or sale of the Bonds

were accomplished by defendants through the means and instrumentalities of interstate commerce or the mails

54. Defendants directly solicited and sold Bonds to Abell, Walton and other Bond Purchasers, and/or were substantial factors in causing the offers and sales of Bonds to Abell, Walton and other Bond Purchasers, in the respects, among others, set forth in the General Allegations.

55. The Bonds were not registered with the Securities and Exchange Commission as is required under Section 5 of the Securities Act.

56. The offers and sales by defendants to Abell, Walton and the other Bond Purchasers constituted a violation of Section 12(1) of the Securities Act..

57. Alternatively, the Fryar Group, the Peck Group, and Skye knew or should have known by the exercise of due diligence of the plan to offer to the public the Bonds, and that their role in the plan was part of an overall improper activity, but, nevertheless, substantially assisted the plan in the respects, among others, set forth in the General Allegations, and thereby aided and abetted the violations of Section 12(1) of the Securities Act.

58. Accordingly, Abell, Walton and all other Bond Purchasers are entitled to a judgment against the defendants and the Insurance Companies (which are directly liable to Abell, Walton and all other Bond Purchasers pursuant to La. R.S. 22:655 for damages caused by the acts and omissions of their insureds), jointly, severally and *in solido*:

(a) rescinding their purchases of the Westside Bonds and ordering return of the

consideration paid therefore, plus legal interest from the date the amounts were paid; and,

(b) alternatively, for damages if the Bonds are no longer owned.

COUNT TWO
SECURITIES ACT: SECTION 12 (2)

59. All of the preceding allegations of this complaint are incorporated herein by reference.

60. In connection with the offers and sales to Abell, Walton and all other Bond Purchasers, defendants made untrue statements of material facts and omitted to state material facts necessary in order to make the statements, in light of the circumstances in which they were made, not misleading, in the respects, among others, set forth in the General Allegations, all in contravention of the provisions of Section 12(2) of the Securities Act.

61. Alternatively, the Fryar Group, the Peck Group, and Skye knew or should have known by the exercise of due diligence of the plan to sell the Westside Bonds, and that their role in the plan was part of an overall improper activity. Nevertheless, they substantially assisted the plan in the respects, among others, set forth in the General Allegations and thereby aided and abetted the violation of Section 12(2) of the Securities Act.

62. Accordingly, Abell, Walton and all other Bond Purchasers are entitled under Count Two to the same relief to which they are entitled under Count One.

COUNT THREE
EXCHANGE ACT: SECTION 10 (b)

63. All of the preceding allegations of this Complaint are incorporated herein by reference.

64. The Bonds constitute "securities" as that term is defined in the Exchange Act.

65. The Fryar Group, the Hancock Group and Skye as, among other things, promoters of Westside, underwriters, counsel to the issuer, and fiduciaries, owed a duty to Abell, Walton and all other Bond Purchasers to disclose all material facts, including the disclosure of material facts necessary to make statements, in light of the circumstances in which they were made, not misleading.

66. Hancock, HJD and Swink, as, among other things, underwriters, investment advisors, and fiduciaries, owed a duty to Abell, Walton and all other Bond Purchasers to disclose all material facts, including the disclosure of material facts necessary to make statements, in light of the circumstances in which they were made, not misleading.

67. Peck, PSW, Skye and WLJ, as, among other things, bond counsel, counsel to the issuer, and counsel to the underwriters, and as attorneys preparing and participating in the preparation of the Official Statement, Indenture, and legal opinions that they knew or should have known would be relied upon by Bond Purchasers, owed a duty to Abell, Walton and all other Bond Purchasers to disclose all material facts, including the disclosure of omitted material facts, and the disclosure of material facts necessary to make statements, in the light of the circumstances in which they were made, not misleading.

68. In connection with the purchase and sale to Abell, Walton and other Bond Purchasers, defendants intentionally or by severe recklessness, directly or indirectly, employed a scheme or artifice to defraud Abell, Walton and other Bond Purchasers by conspiring to bring securities onto the market which were not entitled to be marketed; by making untrue statements of material fact or omitting to state material facts necessary to make the statements made, in light of the circumstances in which they were made, not misleading; and by engaging in acts, practices, and/or a course of business which operated as a fraud or deceit, in the respects, among others, set forth in the General Allegations, all in contravention of the provisions of Section 10 of the Exchange Act and Rule 10b-5 of the Securities and Exchange Commission.

69. Alternatively, each defendant knew or should have known by the exercise of due diligence of the scheme or artifice to defraud Abell, Walton and the other Bond Purchasers in the purchase and sale of securities, and that his role in the scheme was part of an overall improper activity, but, nevertheless, each defendant substantially participated in the scheme, thereby aiding and abetting the violations of Section 10 of the Exchange Act and Rule 10b-5 of the Securities and Exchange Commission.

70. As a direct result of defendants' actions, the Bonds purchased by Abell, Walton and all other Bond Purchasers are worthless, and Abell, Walton and all other Bond Purchasers have been damaged.

71. Accordingly, Abell, Walton and all other Bond Purchasers are entitled under Count Three to the same relief as to which they are entitled under Counts One and Two.

COUNT FOUR
RICO

72. All of the preceding allegations of this Complaint are incorporated herein by reference.

73. This Count and claim for relief is directed against the Fryar Group, the Hancock Group, and Skye.

74. Westside constitutes or, at all times pertinent hereto, constituted an "enterprise", as that term is defined in 18 U.S.C. §1961 *et seq.*, the activities of which affect or affected interstate commerce.

75. At all times pertinent hereto, the Fryar Group, the Hancock Group, and Skye were employed by or associated with the enterprise.

76. The Fryar Group, the Hancock Group and Skye, through a pattern of racketeering activity involving mail fraud, wire fraud and the fraudulent sale of Bonds in violation of the federal securities laws, as alleged herein, conducted and participated in the conduct of the affairs of the enterprise, in contravention of Section 1962 of Title 18 of the United States Code. These same defendants, through a pattern of racketeering activity as alleged herein, acquired and maintained interests in and control of the enterprise, in contravention of Section 1962 of Title 18 of the United States Code.

77. The Fryar Group, the Hancock Group and Skye further derived income from a pattern of racketeering activity as alleged herein, and have used and invested such income in acquiring interests in, establishing and operating the enterprise, in further contravention of Section 1962 of

Title 18 of the United States Code.

78. Abell, Walton and all other Bond Purchasers have been injured in their business or property by reason of the violations by the Fryar Group, the Hancock Group and Skye of 18 U.S.C. §1962.

79. Moreover, the Fryar Group, the Hancock Group and Skye conspired with each other and with others including, but not limited to, Peck and Swink to conduct the affairs of an enterprise through a pattern of racketeering activity, all in violation of 18 U.S.C. §1962(d).

80. As a result of the violations of 18 U.S.C. §1962 by the Fryar Group, the Hancock Group and Skye, Abell, Walton and all other Bond Purchasers are entitled to recover threefold the damages they have sustained and to recover the costs of this suit, including reasonable attorneys' fees.

COUNT FIVE
LOUISIANA BLUE SKY LAW

81. All of the preceding allegations of this Complaint are incorporated herein by reference.

82. The Bonds constitute "securities" as that term is defined in the Louisiana Blue Sky Law, La. R.S. 51:701 *et seq.* .

83. In connection with the offers and sales to Abell, Walton and all other Bond Purchasers, defendants made untrue statements of material facts and/or omitted to state material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading, in the respects, among others, set

forth in the General Allegations, all in contravention of the provisions of La. R.S. 51:715(3).

84. Accordingly, Abell, Walton and all other Bond Purchasers are entitled to the same relief under Count Five to which they are entitled under Count One, together with the costs of this suit, including reasonable attorneys' fees.

COUNT SIX
WRONGFUL MISREPRESENTATION, FRAUD, MALPRACTICE, NEGLIGENCE, AND OTHER STATE LAW CLAIMS

85. All of the preceding allegations of this Complaint are incorporated herein by reference.

86. The matters alleged in the General Allegations constitute wrongful misrepresentation, fraud, failure to disclose information, breach of fiduciary duty and wrongful conduct under applicable Louisiana law, including Article 1847 of the Louisiana Civil Code, and further constitute negligence, malpractice, gross negligence, wanton negligence, maliciousness, fault and other unlawful and wrongful conduct under applicable Louisiana law, including without limitation Article 2315 of the Louisiana Civil Code.

87. Accordingly, Abell, Walton and all other Bond Purchasers are entitled under this Count to the same relief to which they are entitled under Count One. Alternatively, Abell, Walton and all other Bond Purchasers are entitled to recover damages for defendants' wrongful conduct.

DEMAND FOR TRIAL BY JURY

88. Abell, Walton and all other Bond Purchasers are entitled to and hereby demand trial by jury of all issues in this proceeding.

PRAYER

WHEREFORE, Edward C. Abell, Jr. and Carey Walton, on behalf of themselves, and all other purchasers of Westside Habilitation Center Revenue Bonds, pray that each of the defendants named herein be duly served with a copy of this Complaint and a summons to answer it and that, after all due proceedings, there be judgement herein in favor of themselves, and all other purchasers of Bonds, similarly situated, as follows:

(a) Certifying the requested class;

(b) Granting judgment in the manner set forth in Counts One through Six of this Complaint; and

(c) For all other and further relief as law, equity or the nature of the case may permit.

/s/ Phil Wittmann, T.A.
Judy Y. Barrasso
of Stone, Pigman, Walther, Wittmann & Hutchinson
546 Carondelet Street
New Orleans, Louisiana
70130
Telephone: (504) 581-3200

Attorneys for Plaintiffs

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL

versus

POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL

CIVIL ACTION NO. 84-1786
SECTION O

MEMORANDUM OF STATUS CONFERENCE

Filed Jan. 3, 1985

APPEARANCES:

Phil Wittmann & Judy Barasso	for	Edward C. Abell, Jr. and Carey Walton
Howard Ettinger	for	Potomac Ins. Co. of Illinois
Gene Lafitte, Jr.	for	National Union Fire Ins. Co.
J. Minos Simon & Guy E. Humphries	for	Joe E. Fryar
Charles Hamilton	for	William E. Skye
Howard Ettinger	for	John W. Peck and Peck, Shaffer & Williams

Robert Ellender appearing	for	Mark Bienvenu representing Wright, Lindsey & Jennings
Paul Breaux	for	Rodney Kendrick
Brenner Sadler	for	Swink & Co., Inc.
Michael Allweiss	for	Wallace Turbeville and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo

A status conference was held this date before the magistrate.

December 26, 1984 motion for sanctions by plaintiffs is hereby DENIED.

Hearing on motion to recall certification of class action is set for January 22, 1985.

Deposition of Edward C. Abell, Jr. and Carey Walton are set for Februrary 4th and 5th, 1985 at 9:30 a.m. in Lafayette, Louisiana.

Depositions of Messrs. Skye, Kendrick, VanMol and Land on March 18th and 19th, 1985 in Alexandria, Louisiana, at 9:30 a.m. .

Depositions of Joe Fryar is set for Februrary 25th and 26th, 1985 in Lafayette, Louisiana, at 9:30 a.m. .

Depositions of Messrs. Sisco, Fine and Baxley are set for April 1st and 2nd, 1985. Depositions of Messrs. Sisco and Fine will be in Alexandria, Louisiana, and Mr. Baxley will be in Plaquemine, Louisiana.

Deposition of William Loving and Dave Van Horn and Real Estate Research Corporation are set for April 22nd and 23rd, 1985 in Chicago, Illinois or New York, New York.

Depositions of Messrs. Hancock, Swink, Sheddy Menz and two Swink brokers are set for May 6th, 7th and 8th, 1985 in Little Rock, Arkansas.

Depositions of John Peck and Robert Bruns are Set for May 13th, and 14th, 1985 in New Orleans, Louisiana.

The above depositions will serve for discovery and trial purposes.

All notices concerning subpoenas, depositions or any other court proceedings must be mailed thirty (30) days in advance.

The following sets of dates will be held open for any other remaining discovery matters: June 24th and 25th; August 12th, 13th and 14th; August 26th and 27th, 1985.

Another status conference will be held April 19, 1985 at 10:00 a.m. in Lafayette, Louisiana, before Hon. Mildred E. Methvin.

Lafayette, Louisiana, January 2, 1985.

BY DIRECTION OF UNITED STATES
MAGISTRATE
MILDRED E. METHVIN

ROBERT H. SHEMWELL, CLERK

BY: /s/ Margaret Sonnier
Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL

versus

POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL

CIVIL ACTION 84-1786
SECTION: O

MEMORANDUM OF STATUS CONFERENCE AND SCHEDULING ORDER

Filed May 1, 1985

APPEARANCES

Judy Barasso	for	Edward C. Abell, Jr. and Carey Walton
Howard Ettinger and Frederick Bott	for	Potomac Insurance Co. of Illinois
John Gregory Odom	for	National Union Fire Ins., Co.
J. Minos Simon and Guy E. Humphries	for	Joe E. Fryar
Charles Hamilton	for	William E. Skye
Howard Ettinger and Frederick Bott	for	John W. Peck and Peck, Shaffer & Williams

Mark Bienvenu	for	Wright, Lindsey & Jennings, ABC Ins., Co.
Paul Breaux	for	Rodney Kendrick
Brenner Sadler	for	Swink & Co., Inc.
Michael Allweiss	for	Wallace Tuberville and Mintz Levin, Cohn, Ferris, Glovsky and Popeo
Melanie Hartmann and Kelly Mangum	for	AA Services, Company

A status conference was held this date before the Magistrate.

Deposition of Mr. William E. Skye is set for May 6, 1985 in New Orleans, Louisiana.

Deposition of Mr. Sisco is tentatively set for May 7 and 8, 1985 in Alexandria, Louisiana.

Deposition of Mr. Rodney Kendrick is set for May 13, 1985 and deposition of Mr. Fine is set for May 14, 1985 in Alexandria, La.

IT IS ORDERED that Mr. Joseph Hancock advise the court in writing by May 17, 1985 of his retained counsel or if he intends to represent hinself.

Depositions of witnesses in Little Rock, Arkansas, including Mr. Hancock and Mr. Swink are set for June 24, 25 and 26, 1985.

Depositions of witnesses in Little Rock, Arkansas including Menz and other Swink brokers are set for August 12, 13 and 14, 1985. August 26 and 27, 1985 are reserved for any other discovery matters.

The following sets of dates are held open for any other discovery matters: September 10, 11, 12 and 13; October 22, 23, 24 and 25; November 12, 13 and 14; December 3, 4, 5 and 6, 1985.

Joinder of parties and amendment of pleadings to be filed by Februrary 2, 1986. Deadline for dispositive motions is March 5, 1986. Discovery cutoff is April 4, 1986.

Names, addresses and written reports of expert witnesses plaintiff intends to call will be furnished to opposing counsel by January 31, 1986; defendant shall furnish to opposing counsel names and written reports of such experts it expects to call by Februrary 28, 1986.

A conference regarding pretrial stipulations is scheduled for April 29, 1986 at 9:30 a.m. in the office of Mr. Edward Abell, Jr. in Lafayette, Louisiana. Pretrial stipulations are due by May 22, 1986.

IT IS ORDERED that all counsel be notified by letter seven (7) days in advance of time and place in which documents are produced.

Pretrial conference is scheduled for June 5, 1986 at 9:30 a.m. and trial is scheduled for June 23, 1986 at 9:30 a.m. in Opelousas, Louisiana, before Hon. John M. Shaw.

Another status conference is set for November 22, 1985 at 10:00 a.m. in Lafayette, Louisiana before Magistrate Methvin.

Lafayette, Louisiana. April 19, 1985.

BY DIRECTION OF
UNITED STATES MAGISTRATE
MILDRED E. METHVIN

ROBERT H, SHEMWELL, CLERK

BY: /s/ Margaret Sonnier
Deputy Clerk